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No. 14-112728-A

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

STATE OF KANSAS,
Plaintiff-Appellant
vs.
LARRY SMITH, JR.
Defendant-Appellee

BRIEF OF APPELLEE

Appeal from the District Court of Saline County, Kansas
Honorable Patrick H. Thompson, Judge
District Court Case No. 10 CR 967

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NATURE OF THE CASE

Defendant Larry Smith, Jr. (hereafter "Smith") was charged and convicted by jury of one count of battery on a corrections officer. He now appeals, alleging errors with the jury instructions, that his blood-splattered evidence was erroneously excluded, and cumulative error.

STATEMENT OF THE ISSUE

I. **The district court did not err in refusing to give a self-defense instruction because Smith's testimony specifically foreclosed that line of defense.**

II. **The district court did not err in refusing to admit Smith's bloody paperwork into evidence.**

III. **The district court did not err in failing to give, *sua sponte*, a unanimity instruction because this was not a multiple acts case.**

IV. **As there are no errors, there is no cumulative error, and Smith was not precluded from having a fair trial.**

STATEMENT OF THE FACTS

On August 22, 2010, while Smith was being housed in the Saline County jail, corrections officers went to speak to Smith in his cell about him banging on his cell door

and causing a disruption. (R. I, 20; R. XIV, 107-09, 140-41.) Corporal Henry had the door to Smith's cell opened, and spoke to him about why Smith was kicking the door, and whether or not Smith was trying to hurt himself. (R. XIV, 111.) Henry described Smith's behavior as agitated, and testified that Smith pulled his cell door shut and told Henry he would not stop kicking the door. (R. XIV, 112-113.) During this time, Deputy Milleson had also come to Smith's cell in response to the commotion Smith was causing, and after Milleson arrived, Henry told Smith that Smith would be taken to the booking area of the jail for closer monitoring. (R. XIV, 14, 139-42.) Smith did not want to leave his cell. (R. XIV, 225-27, 238.)

At this point, Milleson and Henry entered Smith's cell, approached Smith's bed, and made physical contact with Smith, who would not stand up. (R .XIV, 115, 42-43.) Smith responded to being touched by flailing, kicking, and punching at the two officers; several of these strikes impacted Milleson in his chest. (R. XIV, 115, 143-44.) Smith then rolled over onto his stomach on the bed, taking Deputy Milleson's arm with him and trapping it underneath Smith's body. (R. XIV, 115, 145, 248-51.) While Milleson's arm was trapped, Smith bit Milleson on the back of Milleson's hand hard enough to draw blood. (R. I, 20; R. XIV, 115-116, 145-46.) Milleson pulled back on Smith's head while Henry used a pressure point on Smith's jaw to try to get Smith to release Milleson's hand, which was ultimately successful; however, Smith continued to flail and kick, ignoring the officer's verbal commands to comply. (R. XIV, 115-17, 145-48, 247-52.)

Smith's behavior continued even after he was moved from the bed to the floor of the cell, and Henry had to resort to using a Taser on Smith, to limited effect. (R. I, 20; R. XIV, 116-119, 148-49.) At some point during the struggle Smith began to bleed, but

despite his continual yelling at the officers, never mentioned that he was bleeding, nor could the officers testify as to how the wound occurred. (R. XIV, 134-35; 137-38, 142-43.) Smith was finally brought under control enough to be handcuffed after Henry Tased Smith a second time. (R. XIV, 119, 148-50.) The entire incident, including the fight, lasted approximately five minutes. (R, XIV, 119-20.) Once Smith was in handcuffs, he refused to walk and had to be carried to the booking area. (R. XIV, 120, 149-50.) He was later examined for injuries by the jail nurse, and found to have a laceration to his head and Taser probes still stuck in his skin. (R. XIV, 120, 134, 149-50, 201-02.) Milleson was found to have a bite mark on his hand and marks on his bicep from the struggle. (R. I, 20; R. XIV, 121, 150-51, 202-03.)

Smith was charged with a single count of battery on a corrections officer, with Milleson as the victim. (R. I, 18.) At trial, Smith was convicted of the sole count of battery on a corrections officer, and placed on probation. (R. I, 55, 82-86; XIV, 288-89.) This appeal follows, and additional facts will be cited below as needed. (R. I, 73.)

ARGUMENT AND AUTHORITY

I. The district court did not err in refusing to give a self-defense instruction because Smith's testimony specifically foreclosed that line of defense.

A. Preservation and Standard of Review

Smith preserved this issue by requesting that the trial court give an instruction on self-defense at the jury instruction conference. (R. XIV, 257.) The State objected, arguing that Smith was not legally entitled to use self-defense against a corrections deputy, and that Smith's testimony foreclosed the possibility that his actions constituted self-defense. (R. XIV, 258.) The court denied the request, stating

> "Well, the Court listened carefully to Mr. Smith's testimony. His testimony was consistent on both direct and on cross-examination that any contact was not intentional or – I believe Mr. Smith's word was 'miscalculation' when testifying about the bite. That he was not swinging, that he wasn't causing a ruckus, that he was saying "I'm not trying to resist, I'm not suicidal." That he was not intentionally striking the officers. So the claim of self-defense would not be consistent with the defendant's own testimony or with the testimony of the officers in this matter. And so, therefore, the Court's going to deny the self-defense instruction." (R. XIV, 258-59.)

There is a well-established framework for reviewing a trial court's decision on whether a requested jury instruction should be given:

> "For jury instruction issues, the analytical progression and corresponding standards of review on appeal are: (a) First, the appellate court considers the reviewability of the issue from both jurisdiction and preservation viewpoints, exercising an unlimited standard of review; (b) next, the court should use an unlimited review to determine if the instruction was legally appropriate; (c) then, the court should determine if there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction; and (d) finally, if the district court erred, the appellate court must determine whether the error was harmless, utilizing the test and degree of certainty set forth in *State v. Ward*, 292 Kan. 541, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594, 182 L. Ed. 2d 205 (2012)." *State v. Smyser*, 297 Kan. 199, Syl. ¶ 4, 299 P.3d 309 (2013).

B. Discussion

The State concedes that Smith preserved this issue for appeal, thereby satisfying the first part of the *Smyser* test. 297 Kan. at Syl.¶ 4. Where Smith fails is the next step: whether the instruction was legally appropriate. *See Smyser*, 297 Kan. at Syl. ¶ 4. Smith raised an identical issue in a second case where he was charged with the same offense under strikingly similar circumstances, and a review of that case is helpful here. *See*

State v. Smith, 318 P.3d 677, 2014 WL 642037 (unpublished decision Feb. 14, 2014), *rev. denied* Dec.30, 2014. In this earlier case (hereafter referred to as *Smith I*), Smith was being held at the Saline County jail and refused to clean his cell; when correctional officers attempted to escort Smith to the booking area so his cell could be cleaned, Smith because angry and combative. *Smith I*, 318 P.3d at Slip Op. 1. Smith swung his fist at and kicked one of the deputies as he attempted to physically restrain Smith, although Smith stated he only accidentally came into contact with the officer. *Smith* I, *id.* At trial, Smith again requested a self-defense instruction. *Smith* I, *id.* There, the Court of Appeals stated that

> "Certainly, self-defense can be a defense against a charge of intentional battery. *See, e.g., State v. Weis,* 47 Kan.App.2d 703, 713, 280 P.3d 805 (2012). But self-defense is not generally available against a uniformed law enforcement officer—or a correctional officer in this case. See *City of Wichita v. Cook,* 32 Kan.App.2d 798, 801, 89 P.3d 934 (2004).
>
> Accordingly, Smith was only entitled to his requested instruction on self-defense if there was evidence, viewed in the light most favorable to Smith, "sufficient to justify a rational factfinder finding in accordance with [his] theory." *State v. Anderson,* 287 Kan. 325, 334, 197 P.3d 409 (2008). In other words, Smith was entitled to use force against the correctional officers if he reasonably believed that force was necessary to defend against the officers' "imminent use of *unlawful* force." (Emphasis added.) K.S.A.2011 Supp. 21–5222. "A reasonable belief implies both an honest belief and the existence of fact which would persuade a reasonable person to that belief." *State v. Stewart,* 243 Kan. 639, 645, 763 P.2d 572 (1988).
>
> At trial, Smith testified that he did not fight or use intentional force against the officers. Considering his own testimony that he did not fight or otherwise use force to defend himself, it is difficult to imagine that a rational factfinder could conclude that Smith was defending himself. We do, however, recognize that a self-defense instruction may be appropriate under some circumstances even when it is inconsistent with a defendant's own testimony. See *State v. Heiskell,* 8 Kan.App.2d 667, 675, 666 P.2d 207 (1983).

> Nonetheless, in this case, there is no evidence in the record to support a claim that Smith acted to defend himself against unlawful force being used by the officers."

Smith I, 318 P.3d at Slip Op. 2-3.

In the instant case, Smith is no more legally entitled to a self-defense instruction here as he was in his previous case. First, according to the State's witnesses, Smith began the altercation by responding to being touched by the officers with flailing limbs and gnashing teeth. In general, the use of force in defending yourself is not an allowable defense for one who initially provokes the use of force against himself. K.S.A. 21-5226(b) and (c). Smith began this altercation by first refusing to comply with lawful orders from the officers, and second by using and escalating the physical force involved. The trial court was not obligated to give an instruction that Smith was not legally entitled to under the plain facts of the case.

Second, Smith was also not legally entitled to 'defend' himself against the corrections deputies carrying out their lawful duties. *See* K.S.A. 21-5224(b)(4); *Smith I*, 318 P.3d at Slip Op. 2; *City of Wichita v. Cook*, 32 Kan.App.2d at 801. The deputies were attempting calm a disruptive inmate, and escort him to another area of the jail—actions that were well within their lawful, ordinary duties as corrections officers at the jail. (R. XIV, 105-09, 139-40.) The testimony from the various deputies established that they were on duty, engaging in their assigned duties as corrections officers; even Smith's trial counsel conceded in closing argument that Deputy Milleson was "doing his job." (R. XIV, 279.) The deputies' use of force was prompted by, and in proportionate response to, Smith's conduct. The deputies had to determine a reasonable response at the time under the totality of the circumstances, and clearly acted appropriately in the face of

Smith's continued struggles. "The degree of force [an officer may use] may be reasonable even though it is more than is actually required. The officer may not, however, use an unreasonable amount of force or wantonly or maliciously injure a suspect." *Dauffenbach v. City of Wichita*, 8 Kan. App. 2d 303, 308, 657 P.2d 582, 587 *aff'd*, 233 Kan. 1028, 667 P.2d 380 (1983).

The testimony was clear that none of the deputies involved in this struggle had any intent to maliciously injure Smith, and that the entire incident could have been avoided if Smith had simply complied with the deputies' verbal commands. As such, Smith was not legally entitled to raise self-defense in this case. And although the trial court did not address this aspect of the State's objection to the requested instruction, "[i]n the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering v. Gowran*, 302 U.S. 238, 245, 58 S. Ct. 154, 158, 82 L. Ed. 224 (1937).

Furthermore, even if Smith were *legally* entitled to such an instruction, the evidence at trial firmly established that *factually* he was not. *See Smyser*, 297 Kan. at ¶4. Smith's testimony, while convoluted at times, was clear on one fact: that he did not in any way intentionally strike or bite Deputy Milleson, and that any such contact was incidental, accidental, or a result of the deputies' handling of him. (R. XIV, 227-28, 237-46, 249-54.) A defendant is entitled to instructions on the law applicable to his defense theory if there was evidence to support that theory. *State v. Anderson*, 287 Kan. 325, 334-36, 197 P.3d 409 (2009). Any such evidence is viewed in the light most favorable to the defendant, and must be sufficient to justify a rational factfinder finding in accordance

with that theory. *Id*, 287 Kan. at 334-36. This finding can be made even if it is only his own testimony that supports the theory. *Id.*, 287 Kan. at 334-36. Although the standard requires this Court to review any evidence supporting the defendant's theory of the case in the light most favorable to the defendant, there still must be some evidence to support that theory before the trial court must give a requested instruction. *See Anderson*, 287 Kan. at 334-36.

Here, the evidence provided by Smith firmly established—under any light—that he did not intentionally swing at or bite the deputy, and there is nothing by which any rational factfinder could infer that the deputies were applying unlawful force that would justify an inmate using self-defense against a corrections officer. According to the State's witnesses, Smith intentionally began the altercation. Smith's own testimony established that he was in fact resisting the officers by "squirming" and rolling over on top of Milleson's arm, but only unintentionally came into contact with the deputy's hand and chest. Smith's testimony was the only evidence offered by Smith as to Smith's state of mind when this event occurred. There must be *some* evidence to support a defendant's requested jury instruction, even if solely from his own testimony, but here Smith's statements specifically forecloses the factual possibility of asserting that defense. The only theories of the case the evidence established was that either Smith acted intentionally because he was angry, or that he acted completely unintentionally; there is simply nothing in the record that establishes an avenue for Smith acting in self-defense. Therefore, it was not error for the trial court to later deny a request to given such an instruction. *See Anderson*, 287 Kan. at 334; *Smith I*, 318 P.3d at 3.

II. The district court did not err in refusing to admit Smith's bloody paperwork into evidence.

A. Preservation and Standard of Review

At first blush, the State would submit that this issue cannot be addressed by this Court, because Smith has failed to include the proffered documents in the record on appeal. (R. I, 47, 93-99). Without the ability to review the items that Smith requested be admitted, there is no way for this Court to accurately judge what merit they held, or what weight they could have carried with the jury had they been admitted. The burden is on the appellant to furnish an adequate record on appeal; without establishing a record that affirmatively shows prejudicial error occurred in the trial court, any claim of alleged error fails. *State v. Paul*, 285 Kan. 658, 670, 175 P.3d 840 (2008). Consequently, Smith's argument on this issue must fail.

If this Court is going to consider the merits of the issue, the standard of review for whether requested evidence was properly excluded is abuse of discretion, and a trial court's decision on a challenge to the admission of evidence based on foundation will not be disturbed on appeal unless no reasonable person would take the position adopted by the trial court. *State v. Ernesti*, 291 Kan. 54, 64, 239 P.3d 40 (2010); *Hemphill v. Kansas Dept. of Revenue*, 270 Kan. 83, 90, 11 P.3d 1165 (2000); *Vorhees v. Baltazar*, 283 Kan. 389, 393, 153 P.3d 1227 (2007). If there is error, and the allegation involves evidence relating to the defendant's theory of defense, this Court must determine whether the violation was of a constitutional nature, and if so, determine if the error is harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *State v. Cooperwood*, 282 Kan. 572, 576, 147 P.3d 125, 128 (2006).

B. Discussion

Smith testified the proffered papers had been part of a cardboard tablet in his cell, but did not remember where exactly it had been in his cell during the altercation. (R. XIV, 230-31.) The State was allowed to voir dire Smith as to the particulars of when and where the proffered papers had come from after Smith moved to admit them. (R. XIV, 232-35.) Smith could only say that they had been somewhere in his cell before the incident, and had been returned to him by jail staff, in a bag, somewhere between 24 hours to a week afterwards. (R. XIV, 229-36.) The State then objected, and after the Court indicated it would sustain the State's objection, Smith made no further attempts to lay any additional foundation requirements. (R. XIV, 235-36.)

The trial court properly excluded Smith's proffered evidence, as the State made a proper objection to its admissibility based on Smith's inability to lay proper foundation. Such foundational objections are appropriate in a trial. *See Ernesti*, 291 Kan. at 64 (trial court must decide if proper foundational requirements have been met before admitting evidence); *State v. Lieurance*, 14 Kan.App.2d 87, 91, 782 P.2d 1246 (1989) ("Whether an adequate evidentiary foundation was laid is a question of fact for the trial court and largely rests in its discretion. [Citation omitted.] So long as there is substantial competent evidence to support the finding, it will not be disturbed on appeal."); *City of Overland Park v. Cunningham*, 253 Kan. 765, 773, 861 P.2d 1316, 1322 (1993) (an objection that 'foundation is insufficient' is specific enough to qualify as a proper objection).

Furthermore, objections to breaks in the chain of custody are also appropriate. While gaps in a chain of custody generally go toward the weight a jury should give a piece of evidence, rather than serve as a *per se* bar to admissibility, this does not mean

that every piece of physical evidence comes in. *State v. Horton*, 283 Kan. 44, 62, 151 P.3d 9, 21 (2007), states

> "A party offering an object into evidence must show with reasonable certainty that the object has not been materially altered since the object was taken into custody. However, the party is not required to keep the object under lock and key or continuously sealed up. The test for chain of custody is a reasonable certainty that the object has not been materially altered. Any deficiency in the chain of custody goes to the weight of the evidence rather than its admissibility. *State v. McGhee*, 226 Kan. 698, 703, 602 P.2d 1339 (1979). In this case, an officer testified that the objects appeared to be the same objects that were collected in 1974. Thus, the district court properly admitted the objects from Horton's car for the jury to consider."

At the time the trial court ruled on the State's objection, Smith had not established 1) how the splotches came to be on the paperwork; 2) when during the struggle the documents had obtained the red splotches he asserted were blood, 3) that the splotches on the papers were actually blood, and not some other substance; 4) how the papers had gotten from being part of a tablet to four separate sheets of paper, 5) how the tablet had gotten from his cell into jail staff's custody, 6) how the paperwork had been stored while in custody of jail staff, or 7) how long the paperwork had been in the jail's possession. Although Smith testified he had kept the documents in his cell after they were returned to him, he did not know how they came into being. His inability to identify how or when the papers had come into the state they were in when presented at trial meant he could not establish "with reasonable certainty that the [papers have] not been materially altered." *McGhee*, 226 Kan. at 703; *Horton*, 283 Kan. at 62. Reasonable minds could certainly conclude, as did the trial court, that Smith's testimony was insufficient to meet the threshold foundational requirements for admission. Therefore, this Court cannot find an abuse of discretion in the decision to exclude the papers, and the conviction should stand.

However, while the State contends that there is no need to go further into whether the exclusion of the paperwork infringed upon Smith's constitutional right to present his defense, it is apparent that the exclusion of the papers did not infringe upon his presentation of his defense. Smith argues that exclusion of his paperwork undercut his ability to present a defense and only "*could* have provided physical proof to the jury he reacted on a base level and without intention." *Appellant's Brief*, p. 17 (emphasis added). However, by the time Smith moved to present his papers, the jury had already heard evidence from multiple sources that Smith had sustained a head wound sometime during the fight, and that this wound bled. Corporal Henry testified to this, as did Deputy Milleson, Deputy Black, the jail nurse, and Smith himself. (R. XIV, 120-21, 136-38, 159-61, 178-91, 195-96, 202, 206-10, 228-40, 243, 253.)

Given the testimony from multiple sources on the issue of whether or not Smith bled from a head wound, the papers he sought to admit were, at best, cumulative evidence further establishing that fact. "Error may not be predicated upon the exclusion of evidence which is merely cumulative and does not add materially to the weight or clarity of that already received." *Walters v. Hitchcock*, 237 Kan. 31, 35, 697 P.2d 847, 850 (1985). Exclusion of the paperwork did nothing to undermine or prohibit Smith's defense theory that he was struck in the head, and that this was an explanation for his actions—a theory which, as argued above, Smith was not legally entitled to raise.

Additionally, the evidence of the head wound in general does little to bolster Smith's claims of self-defense because the wound only occurred *after* Smith had begun physically resisting the officers, meaning that the wound was a *result* of his resistance, not an impetus for Smith to begin striking the officer in self-defense.

> "While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. See, *e.g.*, Fed. Rule Evid. 403; Uniform Rule of Evid. 45 (1953); ALI, Model Code of Evidence Rule 303 (1942); 3 J. Wigmore, Evidence §§ 1863, 1904 (1904). Plainly referring to rules of this type, we have stated that the Constitution permits judges "to exclude evidence that is 'repetitive ..., only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" *Holmes v. S. Carolina*, 547 U.S. 319, 326-27, 126 S. Ct. 1727, 1732, 164 L. Ed. 2d 503 (2006).

Admission of the physical files do nothing to establish that Smith was "stricken with panic and fear" at the time of the struggle. *Appellant's brief*, p. 17. Admission of the paperwork was therefore not necessary, as it was cumulative and legally irrelevant.

Even if exclusion was erroneous, the other evidence—including Smith's own testimony—clearly establishes beyond a reasonable doubt that it was harmless error. Even with evidence from multiple sources that Smith sustained a scalp laceration, the jury still convicted him of the crime, likely because the wound was a result of his admitted resistance. All the witnesses were consistent that Smith was angry, frustrated, and agitated prior to the struggle, and that Smith began the struggle by refusing to comply with the deputies, flailing about, and rolling over onto his bed. Smith did not contest that this incident happened in Saline County on the date alleged, or that Milleson was acting within the scope of his duties as a county correctional officer. The State's evidence demonstrated that Smith struck the deputy multiple times in the chest and continued to bite Milleson's hand, despite multiple verbal instructions from several deputies to stop, and the attempts of several deputies to physically control him after he began these actions. The evidence proved that Smith acted intentionally, and any error in omitting his

proffered documents is harmless beyond a reasonable doubt in light of the overwhelming evidence of his guilt.

III. The district court did not err in failing to give, *sua sponte*, a unanimity instruction because this was not a multiple acts case.

A. Preservation and Standard of Review

Smith did not request, nor did he object to the failure to give, a multiple acts instruction. Where a defendant fails to request or object to the omission of a jury instruction, the standard of review is established both through K.S.A. 22-3414(3) and *State v. Williams*, 295 Kan. 506, 286 P.3d 195 (2012).

> "No party may assign as error the giving or failure to give an instruction, including a lesser included crime instruction, unless the party objects thereto before the jury retires to consider its verdict stating distinctly the matter to which the party objects and the grounds of the objection unless the instruction or the failure to give an instruction is clearly erroneous. Opportunity shall be given to make the objections out of the hearing of the jury."

K.S.A. 22-3414(3).

> "3. K.S.A. 22-3414(3) establishes a preservation rule for instruction claims on appeal. It provides that no party may assign as error a district court's giving or failure to give a particular jury instruction, including a lesser included crime instruction, unless: (a) that party objects…or (b) the instruction or the failure to give the instruction is clearly erroneous. If an instruction is clearly erroneous, appellate review is not predicated upon an objection in the district court.
>
> 4. To determine whether an instruction or a failure to give an instruction was clearly erroneous, the reviewing court must first determine whether there was any error at all. To make that determination, the appellate court must consider whether the subject instruction was legally and factually appropriate, employing an unlimited review of the entire record.

> 5. If the reviewing court determines that the district court erred in giving or failing to give a challenged instruction, then the clearly erroneous analysis moves to a reversibility inquiry, wherein the court assesses whether it is firmly convinced that the jury would have reached a different verdict had the instruction error not occurred. The party claiming a clearly erroneous instruction maintains the burden to establish the degree of prejudice necessary for reversal."

Williams, 295 Kan. at Syl. ¶ 3-5.

"In a multiple acts case, several acts are alleged and any one of them could constitute the crime charged.... [Citations omitted.] Whether a case is a multiple acts case is a question of law over which this court has unlimited review. [Citation omitted.]" *State v. Davis*, 275 Kan. 107, 115, 61 P.3d 701 (2003).

B. Discussion

Although the State did refer in closing arguments to both the strikes to the chest and the bite to the hand, this was not a multiple acts case requiring the jury unanimity instruction. (R. XIV, 271-74.) "The threshold question in a multiple acts analysis is whether defendant's conduct is part of one act or represents multiple acts which are separate and distinct from each other. *State v. Staggs*, 27 Kan. App. 2d 865, 867, 9 P.3d 601, *rev. denied* 270 Kan. 903 (2000)." *State v. Kesselring*, 279 Kan. 671, 682, 112 P.3d 175 (2005). "Incidents are factually separate when independent criminal acts have occurred at different times or when a late criminal act is motivated by 'a fresh impulse.'" *State v. Hill*, 271 Kan. 929, 939, 26 P.3d 1267 (2000).

To determine whether Smith's actions were part of a single unit, or individual events motivated by a fresh impulse, the *Staggs* case is very instructive, and fairly similar

to Smith's case. Staggs was convicted of aggravated battery for allegedly throwing one punch and then kicking the victim once he fell to the ground. *Staggs*, 27 Kan. App. 2d at 865. Staggs argued on appeal this his case was a multiple acts case, requiring a unanimity instruction to be given. *Id.* His argument was based on the idea that some jurors could have convicted him for punching the victim, while others could have convicted him of kicking the victim. The Court of Appeals determined otherwise:

> "The evidence here supports only a brief time frame in which the aggravated battery occurred. Once defendant initiated the altercation, no break in the action of any length occurred, and the confrontation continued until defendant broke the victim's cheekbone. Simply put, the evidence established a continuous incident that simply cannot be factually separated. No 'multiple acts' instruction was necessary."

Staggs, 27 Kan. App. 2d at 868; *see also Kesselring*, 279 Kan. at 682-83 (There, the Supreme Court held there were not multiple acts requiring a unanimity instruction just because "the victim went out onto the porch when Callarman knocked, when the victim was taken to the car, when the victim was returned to the car by Holmes at gunpoint after leaving the car, after the stop at the house when the victim appeared not to be distressed, or when the victim was removed from the car later…." Instead, although these events took place over a longer period of time than in *Staggs*, they were part of the same single transaction, motivated by a single impulse.)

In Smith's case, the facts are very similar. The entire incident was only approximately 5 minutes in duration. There was a single motivating impulse here for Smith's behavior: he was angry and did not want to comply with the correction officers' orders. That impulse never wavered, as evidenced by the testimony that Smith was continually yelling and physically resisting the entire time. There was no break in the

struggle, and the officers never left Smith's cell and then 're-engaged' with him physically after they initially attempted to stand him up off his bunk. The blows to the chest and the bite to the hand were not separate and distinct events, but part of a continuing transaction; there was no intervening impulse between the two that would demarcate the two events as distinct or separate chargeable offenses. Both events occurred in the same location, over a very short period of time, during the same struggle to bring Smith under control by the corrections officers, with no intervening event or impulse separating the two. *See Staggs*, 27 Kan. App. 2d 865, 867; *Hill*, 271 Kan. at 939; *Kesselring*, 279 Kan. at 682-83. As Smith did not object to the trial court's failure to *sua sponte* give an instruction on jury unanimity, he can only prevail on this point if failure to give the instruction is clear error. *See Williams*, 295 Kan. at Syl. ¶ 4. It is clear from the testimony that this was not a multiple acts case, and thus it was not error for the trial court to omit the instruction. As no instruction was required, his conviction should stand.

IV. As there are no errors, there is no cumulative error, and Smith was not precluded from having a fair trial.

A. Standard of Review

For his final issue, Smith argues that cumulative error requires reversal.

> "In the absence of any error, none can accumulate. See *State v. Sharp*, 289 Kan. 72, 210 P.3d 590 (2009). The presence of one error is obviously insufficient to accumulate. See *State v. Davis*, 283 Kan. 569, 583, 158 P.3d 317 (2007). To the extent that more than one error may have occurred, we observe that cumulative trial error requires reversal when the totality of the circumstances substantially prejudiced the defendant and denied the defendant a fair trial. [*State v. Reid*, 286 Kan. 494, Syl. ¶ 20, 186 P.3d 713 (2008)]." *State v. Houston*, 289 Kan. 252, 277-78, 213 P.3d 728 (2009).

B. Discussion

In this case, the State submits that none of Smith's alleged errors were, in fact, errors at all. He was not entitled to a self-defense instruction, because his testimony foreclosed that possibility. The Court's decision not to admit his proffered paperwork was not in error, and even if some error lies in this decision, there is little likelihood that admission of the documents would have changed the outcome of the trial. Nor was a unanimity instruction warranted because this was not a multiple acts case. In the absence of error, none can accumulate, and even if one of these issues is found to have constituted error, it is still harmless and insufficient to require reversal. "A defendant is entitled to a *fair* trial but not a perfect one, for there are no perfect trials. *State v. Bly*, 215 Kan. 168, 178, 523 P.2d 397 (1974)." *State v. Cruz*, 297 Kan. 1048, 1075, 307 P.3d 199 (2013) (emphasis original). A review of the totality of the circumstances reveals that Smith was not substantially prejudiced in any way, nor was he denied a fair trial. In light of the overwhelming evidence of Smith's guilt, his conviction should not be reversed.

CONCLUSION

None of the issues raised by Smith in his brief amount to error, or at best constitute a single error that does not require reversal as it was harmless. Consequently, his conviction for one count of battery on a corrections officer should stand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the above and foregoing **Brief of Appellant** was made by efiling the **original** with the Clerk of the Appellate Courts; and by emailing a copy to the Appellate Defender's Office on this 31st day of December, 2015, to:

Caroline Zuschek
Kansas Appellate Defender's Office
700 Jackson, Suite 900
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